United Nations A/HRC/26/25/Add.3

General Assembly

Distr.: General
28 April 2014

Original: English

Human Rights Council
Twenty-sixth session
Agenda item 3
Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development

Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises

Addendum

Report from an Expert Workshop entitled "Business Impacts and Non-judicial Access to Remedy: Emerging Global Experience" held in Toronto in 2013*

Summary

The present report summarizes the main points discussed at an Expert Workshop entitled "Business Impacts and Non-judicial Access to Remedy: Emerging Global Experience", convened by the Working Group on the issue of human rights and transnational corporations and other business enterprises and held in Toronto, Canada, on 29 and 30 April 2013. The workshop was co-organized by the Canadian Office of the Extractive Sector Corporate Social Responsibility Counsellor and supported by the Government of Canada. The present report informs the Working Group's work on access to remedy and outlines areas for further research and consideration by practitioners.

* The summary of the present report is being circulated in all official languages. The report itself, contained in the annex to the summary, is being circulated in the language of submission only.

GE.14-13944

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Annex

[English only]

Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises from an Expert Workshop entitled "Business Impacts and Non-judicial Access to Remedy: Emerging Global Experience" held in Toronto in 2013

Contents

		Paragraphs	*Page*
I.	Introduction	1–4	3
II.	Access to non-judicial remedy in the Guiding Principles	5–8	3
III.	Types of non-judicial grievance mechanisms	9–11	5
IV.	Possible tensions between international human rights standards and community interests within non-judicial grievance mechanisms	12–13	6
V.	Are all adverse human rights impacts solvable through non-judicial remedy?	14–16	7
VI.	Operational-level grievance mechanisms: questions raised	17–20	8
VII.	Challenges in scaling up access to non-judicial remedy	21–22	9
VIII.	Measuring the effectiveness of processes and outcomes of non-judicial remedy	23–32	10
IX.	Emerging lessons	33–34	12
X.	When to escalate the complaint to a higher level?	35–37	15
XI.	How to avoid duplicate processes?	38–40	15
XII.	Conclusions and recommendations	41–42	16

I. Introduction

1. Pursuant to Human Rights Council resolution 17/4, the Working Group on the issue of human rights and transnational corporations and other business enterprises (hereafter "the Working Group") is mandated by the Council to "continue to explore options and make recommendations at the national, regional and international levels for enhancing access to effective remedies available to those whose human rights are affected by corporate activities, including those in conflict areas". To that end, the Working Group organized an expert workshop on access to non-judicial remedy in the context of adverse human rights impacts related to business, with a focus on current initiatives and examples and how to ensure better outcomes. The workshop was convened as part of the efforts of the Working Group to draw lessons from experts and practitioners on access to effective judicial and non-judicial remedy.

2. The purpose of the workshop was to explore emerging global experience from States, business and other stakeholders on non-judicial grievance mechanisms and access to effective remedy. Specifically, the workshop set out to: (a) discuss how to operationalize the effectiveness criteria for non-judicial grievance mechanisms, as set out in the Guiding Principles on Business and Human Rights (hereafter "the Guiding Principles");[1] (b) identify common elements in the outcomes of effective remedy; and (c) explore how to scale up non-judicial grievance mechanisms. The meeting was also designed to illustrate the different types of practice in this field in order to promote convergence in the way that the Guiding Principles are implemented and understood.

3. Participants at the workshop included approximately 60 representatives from business enterprises, civil society organizations, human rights advocates involved in mediation or litigation to seek redress for victims, experts on indigenous peoples' rights, government officials, international governmental organizations, global industry associations, international investment banks, and trade union networks. The participants had all belonged to, utilized or interacted with a variety of grievance mechanisms, including operational-level (company and site-level) grievance mechanisms, domestic State-level dispute resolution mechanisms, National Contact Points established under the Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises, international-level grievance mechanisms linked to public financial institutions, or multi-stakeholder/multi-industry mechanisms.

4. In order to facilitate frank and open discussions, the workshop was conducted under the Chatham House Rule, meaning that the discussions and the insights shared during the workshop are reported here without attribution.

II. Access to non-judicial remedy in the Guiding Principles

5. Since their endorsement by the Human Rights Council in 2011, the Guiding Principles have been established as the authoritative global standard to address the human rights impacts of business activities, and there is evidence of increasing global convergence around them. The Guiding Principles, or elements thereof, have been and continue to be incorporated into frameworks such as the OECD Guidelines for Multinational Enterprises, the International Standard ISO 26000, the sustainability reporting standards of the Global

[1] Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework (A/HRC/17/31, annex).

Reporting Initiative, the Global Compact, industry guidelines, multi-stakeholder initiatives, as well as State and corporate policies.[2]

6. The Guiding Principles are structured on the United Nations "Protect, Respect, and Remedy" Framework and comprise three pillars: the State duty to protect human rights against infringements by third parties, including business enterprises; the business responsibility to respect human rights; and the need to ensure access to effective remedy for victims of business-related human rights violations and/or abuses. Although the Guiding Principles are not in themselves legally binding, they clarify the existing State obligations with respect to business enterprises arising from the international human rights treaty framework. A key feature of the Guiding Principles is that they prescribe a "smart mix" of State, market and social measures, including regulation, to shape corporate conduct.[3] Therefore, the Guiding Principles brought clarification to a long-standing debate about whether addressing adverse human rights impacts is a voluntary or binding matter.

7. While adverse human rights impacts should in the first instance be prevented through effective policies and processes, the Guiding Principles recognize that adverse impacts may nevertheless occur. The third pillar of the Guiding Principles comprises duties for States as well as responsibilities for business to ensure that people whose rights have been negatively impacted have access to effective remedy. Access to judicial grievance mechanisms is at the core of efforts to ensure effective remedy and it is a central part of the State obligation to protect human rights. However, non-judicial mechanisms can play an important complementary role. Judicial systems cannot always carry the burden of addressing all alleged abuses, and in some cases, claimants themselves may prefer a non-judicial process because it can be faster and/or less expensive. In that regard, the commentary to Guiding Principle 27 calls on States to expand the mandates of existing non-judicial mechanisms and/or add new ones in order to complement and supplement judicial remedy. To make it possible for grievances to be addressed early and remediated directly, Guiding Principle 29 states that business enterprises should establish or participate in effective operational-level grievance mechanisms.

8. It is important to note that the Guiding Principles do not recommend non-judicial remedy over judicial remedy. The logic of having business enterprises develop robust and effective grievance mechanisms or participating in alternative dispute resolution mechanisms is to enable greater access to remedy and, where possible, allow for a constructive transformation of relationships. In addition, operational-level grievance mechanisms can also help prevent adverse human rights impacts, as they allow for early identification of such impacts when workers, unions, communities and consumers raise concerns directly with the business enterprise. Such concerns need not amount to human rights abuses before they can be raised or redressed. Indeed, one of the roles of operational-level grievance mechanisms can be to identify and address concerns before they deteriorate into infringements of rights or serious human rights abuses.

[2] See also the main report of the Working Group on the issue of human rights and transnational corporations and other business enterprises (A/HRC/26/25).

[3] Guiding Principle 3, commentary.

III. Types of non-judicial grievance mechanisms

9. Non-judicial grievance mechanisms come in many forms and may differ widely from each other. The types of non-judicial grievance mechanisms include:[4]

(a) **Operational-level mechanisms**, including company-level and site/project-level mechanisms. Those mechanisms may be designed to deal with anything from low-level complaints that may not constitute human rights abuses, but which may deteriorate into human rights abuses if left unaddressed, to large-scale adverse human rights impacts or legacies of past abuses. Such mechanisms may be operated directly by the business enterprise or be established as a separate function with third-party oversight and operational responsibility, with funding provided by the enterprise. Company-level mechanisms can also encompass complaints mechanisms established through collective bargaining processes;

(b) **Mechanisms linked to industry and multi-stakeholder initiatives**, such as the Fair Labor Association, the Ethical Trading Initiative and the Voluntary Principles on Security and Human Rights. Those mechanisms operate in a variety of ways, often linked to a code of conduct. Affected stakeholders, other participants in the initiative or third parties may be able to lodge complaints, depending on the specific mechanism. Some mechanisms may offer dispute resolution and facilitate mediated outcomes. Others may conduct independent reviews or investigations and offer so-called "global framework agreements" between companies. Global trade union federations may also provide a complaints mechanism;

(c) **National-level mechanisms** that are either based in Government or operate within a particular State. Those mechanisms include State-based dispute resolution mechanisms, OECD National Contact Points, and national human rights institutions (NHRIs). While the latter vary widely between countries, some NHRIs can hear complaints by individuals or groups against corporate actors, and may be able to offer mediation, dialogue and independent investigation or adjudication. Some 43 Governments plus the European Commission adhere to the OECD Declaration on International Investment and Multinational Enterprises, are subject to the OECD Guidelines for Multinational Enterprises and have established a National Contact Point (NCP). NCPs can hear complaints through the specific instance mechanism. NGOs, trade unions and other parties can submit cases of alleged non-observance of the Guidelines by companies. The relevant NCP conducts an initial assessment of whether the issue merits further consideration and can decide to undertake further investigation and offer its offices for mediating a resolution. If a solution cannot be found, the NCP can issue a final statement on the case, in which it may indicate whether it considers that the enterprise has complied with the Guidelines;

(d) **Regional and international mechanisms**, such as the Compliance Advisor Ombudsman of the World Bank Group, and other regional or international development bank mechanisms, such as the Independent Review Mechanism of the African Development Bank Group. For example, the Office of the Compliance Advisor Ombudsman (CAO) is the grievance mechanism for the International Finance Corporation (IFC) and the Multilateral Investment Guarantee Agency (MIGA). CAO hears complaints from stakeholders affected by projects funded by IFC and MIGA, based on the parameters of the IFC Performance Standards. Human rights issues, including labour and indigenous

[4] Classification adapted from: Martijn Scheltema, "Remedy Outcomes of Non-Judicial Grievance Mechanisms: Identifying Elements of Effectiveness", background paper for the Toronto International Expert Workshop, 29–30 April 2013 (ACCESS Facility, The Hague, The Netherlands). Available from www.scribd.com/doc/143932104/Background-Paper-Toronto-Expert-Meeting.

peoples' rights, have been integrated into the IFC Performance Standards. The Ombudsman function of CAO works with affected stakeholders to resolve grievances using a flexible problem-solving approach, including dialogue, negotiation and mediation. The Compliance function monitors whether IFC and MIGA have complied with the Performance Standards. Complaints lodged with the Ombudsman function can be transferred to the Compliance function if dispute resolution is not successful.

10. Even outwardly similar non-judicial grievance mechanisms may vary in the types of issues that they are designed to deal with, the range of processes they employ, the means of access for affected stakeholders, and their ability to enforce outcomes. Complaints resolution processes may range from negotiation, dialogue and mediation, arbitration, and investigation to quasi-adjudicative processes or adjudication.[5]

11. Workshop participants noted that different mechanisms have different benefits and disadvantages, and that their different processes will lead to different remedy outcomes. It is therefore important to identify which mechanism is, or which mechanisms are, appropriate for each situation.

IV. Possible tensions between international human rights standards and community interests within non-judicial grievance mechanisms

12. Some participants cautioned that non-judicial grievance mechanisms might give rise to possible tensions between the satisfaction of community interests and international human rights laws and standards. As has been noted in previous research, interests and rights are not necessarily incompatible, but there may be a trade-off between them.[6] In addition, individuals or communities who feel excluded from the benefits reaped by a business project, or who want more social investment, may articulate their views using language that refers to human rights violations or abuses. Such interests may, for example, involve discussions on business payment of taxes and royalties and State investment back into communities. Conversely, other stakeholders whose rights are negatively impacted by the activities of an enterprise may respond using language that reflects their interests because they may not be aware of the rights framework, which tends to be legal in nature and requires specific knowledge.

13. Companies may also fear that any harm to community interests may sometimes be characterized as a human rights abuse in order to elicit broader attention, and that there is no basis on which to distinguish objectively between an interest and a right. To alleviate those fears, non-judicial grievance mechanisms should be clear about the standards to which they refer and about their parameters for engagement. Non-judicial grievance mechanisms may be appropriate for interest-based negotiations, but a distinction should be made between processes designed to negotiate on the satisfaction of interests and those

[5] For further information on the different processes employed by different mechanisms, see Caroline Rees and David Vermijs, "Mapping Grievance Mechanisms in the Business and Human Rights Arena", Corporate Social Responsibility Initiative Report No. 28 (Cambridge, MA, John F. Kennedy School of Government, Harvard University, 2008). Available from http://shiftproject.org/sites/default/files/Report_28_Mapping.pdf.

[6] See Caroline Rees, "Corporations and Human Rights: Accountability Mechanisms for Resolving Claims and Disputes. Report of 2nd Multi-Stakeholder Workshop, 19–20 November 2007", Corporate Social Responsibility Initiative Report No. 27 (Cambridge, MA, John F. Kennedy School of Government, Harvard University, 2008). Available from www.hks.harvard.edu/m-rcbg/CSRI/publications/report_27_accountability%20mechanisms2.pdf.

designed to remedy specific human rights impacts. At the same time, when communities raise issues related to their interests, it could be their way of raising concerns about or making allegations of adverse human rights impacts. States, civil society organizations, business enterprises and the grievance mechanisms themselves should all ensure that communities are aware of their rights.

V. Are all adverse human rights impacts solvable through non-judicial remedy?

14. While it is essential to maintain focus on the State duty to provide for effective judicial remedy, in many contexts, victims may perceive that they do not have any realistic prospect of gaining access to judicial remedy. That may be because of practical barriers, such as costs, or because of a lack of trust in the judicial system. As a result, some victims may not even consider pursuing judicial remedy. In some cases, non-judicial remedy may be the only realistic option for victims, and the Guiding Principles clarify that non-judicial grievance mechanisms can play an important complementary role to judicial mechanisms. Operational-level grievance mechanisms for those impacted by a business enterprise s activities should never be used to undermine the role of legitimate trade unions in labour-related disputes, or to preclude access to other non-judicial remedy mechanisms or judicial remedy, as clarified in Guiding Principle 29.

15. Workshop participants highlighted that some types of abuse might not be suited to non-judicial grievance mechanisms. For example, criminal liability, including for human rights abuses amounting to crimes under domestic or international law, cannot be addressed through non-judicial mechanisms. In those cases, judicial remedy may almost always be preferable. However, in some cases, victims may have little chance of obtaining any kind of remedy through the judicial system, such as where the judiciary is not effective or independent, or where institutional discrimination exists. In those cases, non-judicial grievance mechanisms may play an important role in obtaining redress for victims. Such a remedy may include apologies, restitution, rehabilitation, financial or non-financial compensation and punitive sanctions, as well as the prevention of harm through guarantees of non-repetition, for example. In all cases, while the victim may obtain remedy through a non-judicial mechanism, that would be without prejudice to any criminal liability that may arise. Participants in a non-judicial grievance mechanism, where criminal liability is involved, must also be free at all times to pursue judicial action against the alleged perpetrators.

16. Workshop participants also discussed the fact that some impacts might not be solvable through non-judicial mechanisms, such as where certain outcomes are unacceptable for the parties involved. For example, if an indigenous community considers that mining activities prevent them from exercising their culture, religion and traditional way of life, it may conclude that the only possible way to redress those impacts would be for the mining activities to cease completely. If a project is in the early planning stages, there may still be a role for mediation between the enterprise and the affected community. However, if either party is fundamentally opposed to compromise, or if the project is already under way, there may not be a non-judicial outcome that would be acceptable to either party. In such cases, judicial mechanisms may be the only appropriate option for addressing the grievance. Some experts at the workshop also pointed to the need for a mechanism that falls between a mediation process and litigation in situations in which the positions of communities and business enterprises are too divergent for mediated outcomes to be achieved.

VI. Operational-level grievance mechanisms: questions raised

17. There is a general impression that operational-level grievance mechanisms, which are typically administered by business enterprises alone or in collaboration with others including relevant stakeholders, have increased in number since the Guiding Principles were endorsed in 2011. However, experts at the workshop reported that operational grievance mechanisms are not yet part of the mainstream. Buy-in for establishing operational-level grievance mechanisms is still often lacking.

18. Workshop participants noted that increased awareness and uptake of the Guiding Principles among companies and project financiers is helping to increase the use of operational-level grievance mechanisms. In particular, international financial institutions and business enterprises are starting to understand better the financial impacts of community-related conflicts. For example, international financial institutions are increasing the capacity of borrowers to resolve issues at the project level before they escalate into larger conflicts or cause more harm. A 2009 report by the Infrastructure Development Finance Company in India shows that, out of 190 large infrastructure projects that were delayed, 70 per cent stalled owing to land-related conflicts.[7] In addition, some experts defined the destruction of shareholder value resulting from conflicts with communities as a motivator for business enterprises to establish more operational-level grievance mechanisms.

19. Participants discussed how to incentivize business enterprises to engage in operational-level grievance mechanisms. Conversations on that issue have traditionally focused on the business case for establishing or scaling up project/site/company-level grievance mechanisms. While some workshop participants argued that it was necessary to make the financial case for companies, others cautioned that the business case is the wrong lever and that respecting human rights should not be considered in terms of financial value to the business. The use of the term "business case" in that context is sensitive and can create confusion. Instead, it may be more constructive to identify incentives for both business enterprises and communities to participate in non-judicial grievance mechanisms, including operational-level grievance mechanisms, and to identify and resolve issues.

20. Participants identified the following incentives for business enterprises to establish or participate in non-judicial grievance mechanisms:

(a) Threat of judicial action: the threat of judicial action and the desire to avoid costly and lengthy litigation would be a major incentive for companies to establish and participate in operational-level grievance mechanisms;

(b) Risk of negative publicity: past experience shows that some companies will only engage with non-judicial grievance mechanisms in order to avoid possible negative publicity. Avoiding negative publicity could be an incentive for companies to establish operational-level grievance mechanisms;

(c) Evidence that such mechanisms resolve problems: evidence of how operational-level grievance mechanisms work to reduce project delays and disruptions caused by conflicts with communities or workers and greater access to case studies and evidence would help to engage business enterprises in that process;

[7] See *India Infrastructure Report 2009: Land—A Critical Resource for Infrastructure*, 3iNetwork and IDFC, p. 1. Available from www.iitk.ac.in/3inetwork/html/reports/IIR2009/IIR_2009_Final_July%2009.pdf.

(d) Earning and maintaining a social licence to operate: businesses are increasingly aware of the need to earn and keep their social licences to operate. Operational-level grievance mechanisms could be seen as an integral part of that effort;

(e) Access to credit: international financial institutions and socially responsible investors increasingly focus on business efforts to resolve community-level conflicts. Some already strongly encourage their borrowers to establish grievance mechanisms;

(f) Investor and customer demands: socially responsible investors and customers could start to demand that companies have grievance mechanisms in place;

(g) Reporting requirements: State-mandated requirements on transparency and reporting, as well as the prevalence of reporting frameworks, such as the Global Reporting Initiative, could create incentives for companies to consider grievance mechanisms, especially if companies are required to report on whether they have such mechanisms in place;

(h) Certification or industry/multi-sector initiatives: if certification schemes related to responsible business conduct or industry/multi-sector initiatives require companies to have grievance mechanisms in place, that could serve as a powerful motivator;

(i) Building trust and legitimacy: especially where companies and communities have to coexist for a long time, the desire to build trust and transform relationships can be an incentive to engage;

(j) Workshop participants agreed that the most important incentive for affected stakeholders to participate in operational-level grievance mechanisms would be to see solid evidence of just, favourable and transparent outcomes from such mechanisms.

VII. Challenges in scaling up access to non-judicial remedy

21. Participants discussed how to scale up access to non-judicial remedy. Participants defined the term "scaling up" in the context of the discussion to mean increased implementation of operational-level grievance mechanisms on the part of companies, and increased access to and use of operational-level and international grievance mechanisms by affected stakeholders.

22. Participants identified the following barriers that might be preventing increased access to non-judicial remedy:

(a) The lack of information on documented cases, including on the claims received, the processes used, and the outcomes achieved, is an issue for both communities and companies, supporting the perception that non-judicial access to remedy is rare, drastic and new;

(b) A lack of capacity on the part of affected communities and companies is a major challenge. It includes a lack of basic negotiation and engagement skills and a lack of ability for communities to represent themselves. Capacity-building is only available in limited instances;

(c) Corporate culture, including a legalistic mindset, may prevent business enterprises from understanding the value of participating in non-judicial grievance mechanisms. That has to be addressed at the cultural level within the enterprise; the enterprise needs to build an understanding of operational-level grievance mechanisms into its policies, systems and culture. It is important to recognize that in order to be successful, doing so will take time;

(d) There is a lack of trust between the parties and in the mechanism itself. Trust is a critical component in the success of non-judicial mechanisms and merits further exploration;

(e) A lack of integration between the different types and elements of non-judicial grievance mechanisms, including a distinction between company, industry/sector, and/or international mechanisms;

(f) A lack of consistency in understanding and implementing the Guiding Principles, particularly between different cultures and jurisdictions;

(g) A lack of information on how non-judicial grievance mechanisms are evaluated and monitored and who decides what constitutes quality in that context;

(h) Cultural differences, such as between Eastern and Western parties in sub-Saharan Africa;

(i) Resistance among some companies, including those that are active on business and human rights issues, to formalize non-judicial grievance mechanisms. More work is needed in that area.

VIII. Measuring the effectiveness of processes and outcomes of non-judicial remedy

23. The effectiveness of a remedy must be assessed in terms of the process and outcome. Guiding Principle 31 contains effectiveness criteria for non-judicial grievance mechanisms, relating to both procedural issues and outcomes. Both State-based and non-State non-judicial mechanisms must be legitimate, accessible, predictable, equitable, transparent, rights-compatible, a source of continuous learning, and, in the case of company-based mechanisms, based on engagement and dialogue.

24. Workshop participants noted that one of the indicators of whether a non-judicial grievance mechanism complies with those criteria is whether the mechanism is consistently used by affected stakeholders, even when other options are available to seek remedy. For that reason, companies that have established operational-level grievance mechanisms generally consider it a sign of success when a number of complaints are lodged. If a large number of complaints are lodged initially, but the numbers then drop significantly, it could indicate that the mechanism is not trusted or is perceived as being ineffective. Another possible performance indicator for the process may be whether complainants report satisfaction with the process even when they did not obtain what they had initially requested, and whether they report that they were able to raise the issues they wished to broach and felt heard in the process.

25. However, those are not comprehensive indicators and they have their own flaws. For example, complaints may be filed even in the absence of trust in a mechanism because the affected stakeholders do not perceive that there is any other option. Furthermore, a high number of complaints over time could indicate a failure to address underlying causes.

26. More investment and research are needed into indicators to enable companies, mechanisms and stakeholders to evaluate the effectiveness of grievance mechanisms. Participants noted that some companies had already trialled a tool for assessing the effectiveness of company-based grievance mechanisms developed by the European

Business Network for Corporate Social Responsibility, CSR Europe.[8] The tool contains process requirements for interpreting the effectiveness criteria contained in Guiding Principle 31. Another current initiative is the Reporting and Assurance Frameworks Initiative led by the non-profit organization Shift, the global accounting group Mazars, and the Human Rights Resource Centre for the Association of Southeast Asian Nations. It aims to develop reporting and assurance standards for companies to ensure that they are aligned with the Guiding Principles.[9]

27. As non-judicial grievance mechanisms differ widely, substantive outcomes also vary widely. Establishing general criteria to measure the effectiveness of such remedy outcomes is therefore difficult. However, Guiding Principle 31 (h) states that outcomes and remedies must be "rights-compatible" meaning that they must be in line with internationally recognized human rights. At the workshop, participants discussed whether common elements of effective remedy outcomes could be identified.

28. The objective of remedy is to counteract or make good a human rights impact that has occurred. For the workshop participants, successful remedies often involved forms of apologies, restitution and guarantees of non-repetition, as well as new opportunities for victims to engage and participate both in the remedy process and more widely in mitigating impacts from a project. Participants highlighted that remedy outcomes that are solely based on financial compensation are problematic, because they often failed to identify solutions to the causes of the adverse human rights impact.

29. In the context of gross human rights abuses, criteria for good remedy outcomes include the fact that the remedy is "adequate, effective and prompt".[10] Those criteria are also increasingly referenced outside of the context of gross abuses. In some situations, effectiveness of remedy can have specific implications. For example, in the context of ongoing abuses, for a remedy outcome to be considered effective, it must involve the fact that the abuse stops. However, often what is considered "adequate, effective and prompt" will depend on the specific situation and the subjective evaluation of the affected stakeholders. Proxy indicators for remedy effectiveness, such as timeliness of resolution, should therefore be used with caution. For example, what is judged as a timely or "prompt" remedy will depend heavily on factors such as the severity and nature of the harm and the ability to reverse the negative human rights impact. Criteria for good remedy outcomes in the context of gross human rights abuses should also be seen in the light of the victims' right to access to relevant information concerning abuses and equal and effective access to justice.[11]

30. Workshop participants discussed the importance of joint design and collaboration when creating operational-level grievance processes in order to ensure that the remedies offered are appropriate and that the resolution process responds to the needs of the community. Where no satisfactory remedy outcomes can be agreed, it is important that affected stakeholders can escalate the grievance, for example through an agreed arbitration process.

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[8] See www.csreurope.org/management-complaints-assessment-service-available-all-members#.U0gdJMdxfdE.

[9] See http://shiftproject.org/project/human-rights-reporting-and-assurance-frameworks-initiative-rafi.

[10] Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law. Adopted and proclaimed by United Nations General Assembly resolution 60/147 of 16 December 2005.

[11] Ibid.

31. Some participants with direct experience of operational-level grievance mechanisms said that, when they are truly based on dialogue and engagement, the mechanisms can positively transform community relations, corporate culture and management systems, and State-level policy reform. That is in addition to providing redress for specific harm. By providing companies with a mechanism to understand how they are perceived in the community and how they may be impacting human rights, operational-level grievance mechanisms can help companies improve. An important long-term consideration of an effective remedy outcome is the need to tackle root causes that may result in abuses. In that regard, compensation alone may not be adequate if it fails to result in a meaningful change in the conduct of a business enterprise. In some cases, effective remedy may mean addressing power imbalances between the enterprise and the affected communities.

32. The experience of workshop participants suggests that many non-judicial, in particular operational-level, grievance mechanisms lack even basic information about the number of complaints they receive and the percentage of cases that are resolved. In that context, it is necessary to be realistic about the current state of play.

IX. Emerging lessons

33. The current trends across a number of multi-stakeholder, national and international non-judicial grievance mechanisms are considered below.

(a) International financial institutions: mechanisms associated with some international financial institutions have seen a sharp increase in their caseload in recent years. That may be owing, in part, to increasing scarcity and competition for resources such as land and water in countries where private sector development is being aggressively pursued, particularly in the extractives sector, large-scale agriculture and infrastructure;

(b) Business engagement in non-judicial grievance mechanisms: experts from national and regional/international mechanisms reported that much work is needed to persuade companies that non-judicial grievance mechanisms are intended to solve problems, not damage corporate reputation. Business willingness to engage is a key issue. Some mechanisms have little recourse to action if business enterprises refuse to engage with the process. Some experts positioned that there might be a need to establish consequences for companies that unilaterally withdraw from mechanisms and for civil society organizations or claimants that blatantly misuse mechanisms;

(c) Trust in the mechanism: some experts noted that a lack of trust in international mechanisms is a challenge. In some cases, affected stakeholders might perceive the mechanism as biased towards a business or lacking in transparency and independence;

(d) Access: ensuring access to a mechanism continues to be a major issue. There have been attempts to raise awareness of non-judicial grievance mechanisms, including direct outreach to people living near project sites, conversations with civil society, and with the private sector. However, awareness among affected stakeholders is typically low. Some international mechanisms report push-back from companies following targeted outreach efforts;

(e) Capacity of affected stakeholders and power imbalances: another ongoing challenge is the lack of capacity of affected stakeholders/communities to be able to represent themselves in dialogues and negotiations. However, companies also sometimes lack capacity to engage. Some mechanisms invest in capacity-building for both sides to ensure that they can engage in a dialogue;

(f) Enforceability of outcomes: industry, national and international mechanisms are often incapable of enforcing implementation of mediated outcomes, and they depend on the goodwill of the affected parties. Reaching agreements that are satisfactory for both parties helps incentivize compliance;

(g) Timeliness: the length of time it takes to reach an outcome is an ongoing issue for several mechanisms. The OECD has tried to address that by prescribing a 12-month resolution process for complaints filed with National Contact Points. Other mechanisms report that time is less of a concern as long as the outcome is solid;

(h) National Contact Point harmonization: one challenge to the OECD system of National Contact Points is that they have different resources, experience and, in some cases, they interpret their mandates differently. That can lead to a lack of predictability, consistency and fairness. It is an issue both for the claimants and for companies because it creates an uneven playing field. There are efforts at the OECD level to continuously improve National Contact Point performance, including by promoting increased cooperation;

(i) Dirty tactics: one expert explained that one complaint filed with an international non-judicial grievance mechanism took more than five years to settle because the business enterprise involved was allegedly deliberately stalling the process. Other experts reported that in some cases, enterprises might pretend to engage while dragging out the process in order to avoid reaching a mediated outcome. At the same time, it was claimed that some civil society organizations file complaints without any intention of engaging in dialogue or reaching a mediated outcome;

(j) Requirement to exhaust local remedies: requirements on the part of some mechanisms that victims must exhaust local remedies before filing a complaint can present insurmountable barriers for affected stakeholders. The affected stakeholders might lack practical access to local remedies, owing to the cost, for example, or such processes may be time-consuming or perceived as biased.

34. Emerging lessons from operational-level grievance mechanisms include:

(a) Operational-level grievance mechanisms can result in significant benefits: workshop participants from companies that have established operational-level grievance mechanisms reported significant benefits in terms of stakeholder engagement, understanding how the business is perceived in the community, and in preventing an escalation of conflict;

(b) The internal credibility of the mechanism matters: one business enterprise that had established a site-level grievance mechanism testified as to the importance of integrating it within a wider social management system. The enterprise had also invested significant efforts in selling the mechanism internally. The mechanism has to be perceived as relevant to the work of senior leadership, for example by connecting the success of the business to the potential negative consequences of failing to address the adverse human rights impacts through the grievance mechanism. The enterprise found that it was critical to plan and budget for the mechanism up front and to make it part of the environmental and social management system of the company;

(c) The experts noted that the staff members responsible for implementing the non-judicial grievance mechanism often have limited authority within the enterprise. Furthermore, the people with most insight into the concerns raised at the community level sit at periphery of the enterprise. A general challenge is that stakeholder engagement regularly takes place at the periphery of company decision-making and practices. Meanwhile, operational-level grievance mechanisms are often not sufficiently integrated with corporate stakeholder engagement plans. There is a need to integrate project-level

grievance mechanisms better in established corporate processes, such as social and environmental impact assessments, human rights impact assessments and social baseline studies;

(d) The importance of co-creating grievance processes: some experts reported that there is a tendency for business enterprises to announce the creation of a grievance mechanism before consulting with and seeking input from affected stakeholders. Enterprises will receive a complaint, decide what the course of action will be, and then communicate the perceived best approach to the complainants. That can result in communities feeling that they lack power or agency in the process, and it can reduce trust in the mechanism and its legitimacy;

(e) Increasing stakeholder capacity: while there is increasing training and education being offered to stakeholders on human rights and grievance mechanisms, often financed or supported by companies, it is not yet widespread. More needs to be done on conflict analysis and dispute resolution in order to ensure that practitioners know how to build a grievance mechanism that is sensitive to complex cultural issues. Furthermore, affected communities and individuals often arrive at operational-level grievance mechanisms with very little bargaining power. Processes and outcomes that take into account local contexts are also necessary, such as recognizing indigenous peoples' traditional processes for settling conflicts;

(f) There is little analysis and investigation of the processes and outcomes of previous operational-level grievance mechanisms. In occupational health and safety, root-cause analysis has become the standard, but it is not often used for social issues;

(g) Deep learning versus quick resolution: there is a tension between people who want the grievance mechanism to allow for complaints to be heard in order to ensure a deeper understanding of the issues and the tendency for some companies to want to bring a quick and tidy end to the case. Education of internal as well as external stakeholders may be required in that respect;

(h) Engagement: several companies fail to integrate their operational-level grievance mechanisms firmly within the community. Doing so may inform companies about how they are perceived in the community, stop escalation of minor grievances and prevent further harm by identifying issues that can be resolved. In addition, workshop participants said that, in order to be truly successful, companies need to view the grievance mechanism as part of a permanent dialogue with the communities in the areas where it operates. Engagement should begin at the earliest possible stage and companies should deliver continuous and targeted awareness-raising on the grievance mechanism. Having a designated focal point for the mechanism, who can do personal outreach, might help establish trust in the mechanism;

(i) Gender dynamics need to be taken into account both in designing a non-judicial grievance mechanism and redressing impacts. Companies should be sensitive to the fact that women and girls may experience harm in different ways to men and boys, and that traditional dispute resolution systems may not appropriately or equally consider the perspectives of women. One expert pointed out that the issues preventing women from accessing grievance mechanisms are often complex and hidden owing to power imbalances and cultural taboos in the community;

(j) Clarifying the definition of "risk": a common stated aim of an operational-level grievance mechanism is to avoid risk. That is still largely defined as risk to business, such as resolving issues before they result in project delays. However, there is a competing notion of risk: social risk, which is less clearly defined or commonly referenced. While enterprises focus on reputational and production risk, other interested parties focus on the

social risk or risk to human rights. The undefined nature of social risk may affect the way operational-level grievance mechanisms are conceived;

(k) Disagreement over all complaints being defined as adverse human rights impacts: some participants communicated a pushback against what some companies see as a tendency to characterize any complaint or issue as an adverse human rights impact. For example, when an extractive company's vehicle runs over livestock belonging to a rural community, it may have a negative impact on the owner, but it may not in itself amount to a human rights abuse. However, operational-level grievance mechanisms need not restrict themselves to negative impacts that amount to human rights abuses. Often by resolving small-scale impacts and grievances at an early stage, companies can prevent a situation from deteriorating or escalating and also expose underlying human rights issues. Addressing immediate, low-level grievances can also help to build trust in the mechanism among the affected stakeholders.

X. When to escalate the complaint to a higher level?

35. Participants explained that operational-level grievance mechanisms best deal with grass-root level complaints that are suitable for immediate resolution. When an operational-level mechanism does not achieve a satisfactory outcome for the affected parties, there should be an option to take the complaint to a higher level. Options for escalation may include State-based non-judicial mechanisms, mechanisms tied to international financial institutions, national human rights institution mechanisms, arbitration and judicial processes. In any case, an operational-level grievance mechanism should never be used to undermine the role of legitimate trade unions in addressing labour-related disputes, or to preclude access to judicial or other non-judicial grievance mechanisms.

36. In the experience of workshop participants, non-judicial complaint mechanisms that operate on an international level, such as the Compliance Advisor Ombudsman of the World Bank Group and the OECD National Contact Points, often only come into play when complainants have exhausted other available remedies. At that stage, both complainants and the companies have often become more entrenched in their positions.

37. Issues may also arise when a community is not in agreement. For example, a specific complaint may benefit only one part of a community. In such cases, dispute resolution and grievance mechanisms may result in situations where one part of a community could gain advantages over another. In those complex situations, escalation to judicial mechanisms may be a better option.

XI. How to avoid duplicate processes?

38. Participants discussed the need to ensure effective access to appropriate mechanisms and avoid duplication. In the human rights system, the standard practice is that a complaint cannot be filed with multiple forums at the same time. Participants noted that businesses, communities and civil society actors often lack the required knowledge to make informed choices on grievance process options. That can result in victims bringing their claims to a mechanism that is ill-suited when a better option might have been available. Some experts also reported that the lack of predictability of some national and international grievance mechanisms and different mandates between mechanisms including, for example, differing mandates and processes between OECD National Contact Points in different countries, might lead stakeholders to file their complaint in as many forums as possible in the hope that one forum will take it up. One example of good practice in avoiding duplication is a

process between international financial institutions to check with co-financiers on whether a complaint is already being handled in another international financial institution mechanism.

39. Issues can also emerge when different non-judicial mechanisms come to different conclusions. One expert cited a dispute involving a State and an enterprise that had been filed with three different mechanisms, all of which returned different conclusions. In the end, there was no remedy for the affected stakeholders.

40. Clearer admissibility criteria and clearer information on expected outcomes are required for claimants to be able to identify better the appropriate forum in which to file a complaint. Research is under way to map existing grievance mechanisms, including admissibility criteria, processes, expected outcomes, monitoring and enforcement.

XII. Conclusions and recommendations

41. **The following recommendations were made at the expert workshop:**

(a) Increase peer learning and evidence of what works: participants highlighted the need for a substantial increase in learning within companies, between companies, and between different industries. Even business enterprises that have significant experience with project-level grievance mechanisms often do not share their lessons learned between different project sites. Providing a space for States, business and civil society to share best practice should be prioritized to increase peer-to-peer learning. There is also a need to create platforms for dialogue between those who set up and implement non-judicial grievance mechanisms and those who use them. Workshop participants, furthermore, highlighted the need for more public evidence about what works well, including the effectiveness of outcomes for affected stakeholders. Some stakeholders recommended the creation of industry-specific guidance.

(b) Involve new audiences: participants emphasized the need to continue multi-stakeholder conversations and to involve new audiences who are not already engaged in the issue. Some participants recommended creating an action plan to go beyond what they called "coalitions of the willing". Others warned of the risk of going too far ahead of mainstream actors, such as the business community, without getting their buy-in, and talking exclusively to experts or to those who have already bought into the concept of operational-level grievance mechanisms. Several participants also cautioned against stakeholders from the global North conducting studies and developing theories for the global South. They highlighted the need to bring in more voices and experts from the South and from non-Western regions. Ways to engage small and medium-sized companies from both home and source countries in resource-effective ways should also be explored.

(c) Identify which mechanisms are appropriate for different situations: in conceptualizing further research and processes for advancing the field, some participants also emphasized a need to be cautious about focusing heavily on the potential of operational-level grievance mechanisms. Such mechanisms are only one type of non-judicial grievance mechanism, and while they can play important roles in resolving adverse impacts, they may not be appropriate for redressing serious human rights abuses. In that context, more work may be needed to identify robust criteria for choosing the right forum, including situations in which judicial remedy may be the best option.

(d) Avoid duplication and overlap: while discussing the range of grievance mechanisms and processes that should be open to affected stakeholders, some

participants warned of the need to avoid duplicating existing mechanisms. In that vein, they suggested further investigating and mapping traditional and community-level dispute resolution mechanisms, and finding ways to ensure that companies are aware of such mechanisms before developing their own grievance mechanisms. Some participants also warned against creating over-complicated and duplicative structures that add costs, in particular for the claimants.

(e) Consider learning from established grievance processes: more should be done to investigate and evaluate lessons from existing grievance processes in areas such as industrial relations, national human rights institutions, and commercial frameworks. At the same time, there is a need to be cautious against over-simplification, and to recognize that remedy mechanisms for labour rights violations play different roles and will have different processes and outcomes to remedy mechanisms for community-level human rights impacts, for example.

(f) Frame the issues in the correct way: participants highlighted the need to conceive the issue more broadly, for example not just in terms of resolving grievances, but in terms of consultation, engagement, interest accommodation and benefit sharing. Other participants warned against taking the approach that access to non-judicial remedy is about dispute resolution, highlighting that the focus needs to be clearly on remedy for human rights abuses. Participants also cautioned against reducing every issue to a community-company dispute.

(g) The role of the State: more consideration is needed of the role of the Government, locally and nationally. Framing adverse human rights impacts as a community-company issue risks excluding important stakeholders, such as the State, resulting in missed opportunities to strengthen State institutions. Participants also cautioned against advocating operational-level or non-State grievance mechanisms in the place of State-based and judicial mechanisms. In that vein, participants recommended bringing in more government representatives to discussions about access to non-judicial remedy.

(h) Effectiveness of outcomes for rights-holders: participants emphasized the need to listen to the voices of affected communities and stakeholders in order to understand the effectiveness of non-judicial grievance mechanisms. There is also a need to investigate further the perspective of affected stakeholders on the effectiveness of non-judicial grievance processes and outcomes, and to understand how the design of grievance processes may drive certain remedy outcomes as well as other factors shaping the outcomes of such processes. That would facilitate a better understanding of how to drive rights-compatible outcomes.

(i) Avoid one-size-fits-all approaches: participants cautioned against one-size-fits- all approaches to access to non-judicial remedy and against making general assumptions. Some participants emphasized the need to recognize that access to non-judicial remedy encompasses a broad range of different mechanisms at different levels of maturity and with different challenges. For example, the challenges in scaling them up will differ accordingly. Some participants also warned against losing sight of the long term when trying to redress human rights violations, and they highlighted that the current phase was an experimental one.

42. Participants raised a number of questions for potential further research on non-judicial grievance mechanisms, including:

(a) How can the mandates of existing grievance mechanisms be expanded? What is the scope for creating new mechanisms?

(b) How are operational-level grievance mechanisms shaping conflict trajectories? What kinds of grievances do they prevent from escalating?

(c) What are the user perspectives on operational-level grievance mechanisms?

(d) Under what conditions are non-judicial mechanisms most likely to deliver good results?

(e) What should be the role of quasi-State entities such as State-level export credit agencies and banks? Should they have their own grievance mechanisms? Concerning impact assessments and remedy outcomes, particularly for operational-level grievance mechanisms:

- **Do they deliver fair remedy or is the remedy watered down?**
- **How do they change corporate conduct?**
- **How can they protect from future harm?**

(f) Under what circumstances, if any, is it appropriate to ask victims to sign away their right to a judicial process in order to achieve a non-judicial remedy?

(g) What lessons can be learned about business processes in operational-level grievance mechanisms?

(h) Concerning operational and substantial aspects of grievance mechanisms from a business perspective:

- **How is an operational-level grievance mechanism rolled out in practice? What are the practical experiences of where to house such mechanisms? How should they be staffed and funded?**
- **What does it mean to say that victims should have independent legal advice if the victims have no ability to pay for their own counsel?**
- **What are the timelines, costs, and effectiveness of closure of operational-level grievance mechanisms?**